No. 841.

Supreme Court of the United States

OCTOBER TERM, 1921.

KING COUNTY, WASHINGTON,

Appellant,

VS.

SEATTLE SCHOOL DISTRICT NO. 1, a Municipal Corporation,

Appellee.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF APPELLANT

MALCOLM DOUGLAS,
Solicitor for Appellant.

HOWARD A. HANSON,
Of Counsel.

P. O. Address:
431 County-City Building, Seattle, Washington.

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BRIEF OF APPELLANT

STATEMENT OF THE CASE.

This case was brought in the District Court of the United States for the Western District of Washington, Northern Division, and tried before the Honorable Jeremiah Neterer, Judge, who entered a decree in favor of appellee. On appeal to the United States Circuit Court of Appeals for the Ninth Circuit the decree was affirmed. From that affirmance this appeal is prosecuted.

The case involves official exercise of discretion in the disbursement of certain federal forest reserve moneys appropriated by Congress.

In 1905 Congress transferred the Forestry

Service from the Department of the Interior to the Department of Agriculture. Act of February 1, 1905, 33 U. S. Stat. at L., Part I, p. 628.

In 1907 Congress, in a proviso attached to the appropriation bill for the Department of Agriculture, declared as follows:

> "* * * And provided, further, than ten per centum of all money received from each forest reserve during any fiscal year, including the year ending June 30, 1906, shall be paid at the end thereof by the Secretary of the Treasury to the State or Territory in which said reserve is situated, to be expended as the State or Territorial Legislature may prescribe, for the benefit of the public schools and public roads of the county or counties in which the forest reserve is situated. Provided, further, that when any forest reserve is in more than one state or territory or county, the distributive share to each from the proceeds of said reserve shall be proportional to its area therein, and provided, further, that there shall not be paid to any state or territory for any county, an amount equal to more than forty per centum of the total income of such county from all other sources * * *."
>
> Act March 4, 1907, 34 U. S. Stat. 1270, Fed. Stat. Annot. Sup. 1909, p. 665.

In a similar appropriation bill for 1908 the

ten per cent was raised to *twenty-five* per cent. Act. May 23, 1908; Fed. Stat. Annot. Sup. 1909, p. 666.

In 1907, the Washington State Legislature passed an act as follows (Laws 1907, Chap. 185, p. 406, Remington's 1922 Code, §§ 6721, 6722):

> "Section 1. That the State Treasurer is hereby directed to turn over to the treasurers of the respective counties within the forest reserves, the amount of money belonging to such county, received from the Federal Government from such forest reserves, in accordance with an act of Congress, approved February 1, 1905. Where the reserve is situated in more than one county the money shall be distributed in proportion to the area of the respective counties interested, and to that end the State Treasurer is hereby authorized and required to obtain the necessary information to enable him to make the distribution on such basis.
>
> "Section 2. County Commissioners of the respective counties to which the money is distributed are hereby authorized and directed to expend said money for the benefit of the public schools and public roads thereof, and not otherwise."

Commencing in 1908 forest reserve funds have annually been paid by the Secretary of the Treasury to the State of Washington. The State Treas-

urer has disbursed these sums to the counties interested. The county commissioners of appellant King County have expended the moneys so received by it at times half to public road purposes and half to public school purposes; at other times all to public road purposes.

Appellee brought suit alleging that King County had not made equal disbursement of such funds annually for public road and public school purposes.

It alleged that if such funds had been equally divided annually, and if the portion thus allotted to public school purposes had been distributed to the several school districts on a pro rata basis, appellee would have received $6,789.22 more than it actually had received.

It alleged that such unequal distribution of such funds constituted a misappropriation by appellant and prayed for judgment for such sum. To the complaint there was interposed a motion and supplemental motion to dismiss the bill of complaint (Tr. pp. 12-15). These were overruled. Later an amended bill of complaint correcting certain figures was filed. By stipulation of the parties the original motion and supplemental motion to dismiss were considered as applying to the amended complaint and were overruled by the court (Tr. p. 18). Appellant refused to plead further. Judgment was entered and the appeal to the Circuit Court of Appeals and to

this court followed. For convenience, reference hereafter to the complaint will be understood to mean the amended complaint.

Appellant contends that under the law the Court has no power to control discretion in the expenditure of these funds, that the county commissioners may determine upon what roads and in what amounts for each road, such funds shall be expended. Also that they may determine whether moneys which they may devote to school purposes shall be expended by the county through its County Superintendent of Schools, or be applied in aid of particular rural schools adjacent to the forest reserve, or be applied to the benefit of all school districts in the county, and if so upon what basis the distribution shall be made.

Appellee contended below that these funds are trust funds, that a court of equity has power to enforce the trust created by the appropriation Act of Congress.

ASSIGNMENTS OF ERROR.

Appellant specifies and assigns error as follows:

I.

That the United States Circuit Court of Appeals for the Ninth Circuit erred in affirming the decree made and entered on the 11th day of July, 1921, by the District Court of the United States

for the Western District of Washington, Northern Division.

II.

That the United States Circuit Court of Appeals for the Ninth Circuit, erred in not reversing the decree of the United States District Court of Washington, Northern Division, aforesaid, on account of error of the United States District Court for the Western District of Washington, Northern Division, in denying the motion interposed by defendant and appellant King County to dismiss the amended bill of complaint in the cause.

III.

That the United States Circuit Court of Appeals for the Ninth Circuit erred in not reversing the decree of the United States District Court of Washington, Northern Division, aforesaid, on account of error of the United States District Court for the Western District of Washington, Northern Division, in denying the supplemental motion interposed by defendant and appellant King County to dismiss the amended bill of complaint filed in the cause.

ARGUMENT.

The decision of the trial court was rendered on the authority of *Everett School Dist. No. 24 v. Pearson*, 261 Fed. 631, which arose out of similar facts and was decided upon the principles of law applicable to *private trusts*. The Court expressly states in the opinion (p. 632):

> "The defendants have moved to dismiss, first, on the ground that the court has not jurisdiction of the subject-matter; second, that the bill of complaint does not state facts to constitute a valid cause of action in equity.
>
> "No argument was presented upon the first ground of the motion to dismiss.
>
> * * * * *
>
> "I think it must be conceded that the acts of Congress (Act March 4, 1907, and Act May 23, 1908, *supra*) created an express trust, of which the several school districts and road districts are the *cestuis que* trustents.
>
> * * * * *
>
> "It would seem that the general rule applicable to the construction of gifts, wills and deeds should apply, where it is established that when bequests, gifts or grants are made to two or more persons, each is presumed to take an equal share, in the absence of limitations to the contrary."

It is thus clear that the trial court both in the

Everett School District case and in the case at bar based its decision upon the general rules applicable to *private trusts.*

The Circuit Court of Appeals in its opinion 278 Fed. 46 (Tr. of R. 45), held that no trust, private or charitable was created, but that "it is a trust, public in its nature, but to be dealt with on like legal principles as pertain to private trusts." Continuing, the opinion states (Tr. of R. p. 51):

> "Nor do we think this a matter between two sovereignties, that is, between the general government and the State of Washington, as is illustrated by the cases of *Alabama v. Schmidt*, 232 U. S. 168; *Emigrant Co. v. County of Wright*, 97 U. S. 339, and *Emigrant Co. v. County of Adams*, 100 U. S. 61."

And again (Tr. of R. p. 52):

> "* * *we concur with the Court below that the language should receive a like construction to that which obtains with the respect to wills, gifts and deeds, where property is bestowed upon or passed to two or more persons without defining the proportion in which they shall take; the presumption being that they shall take in equal portions."

We agree with the Circuit Court of Appeals that the decree cannot be sustained on the theory of either private or charitable trusts, but we

urge that no trust status is created at all; that it is a matter wholly between two sovereignties, the general government and the state, and not a matter for judicial review.

I.

THE TRIAL COURT HAD NO JURISDICTION OF THE SUBJECT-MATTER OF THE ACTION OR OF THE PARTIES.

The Federal Court will not assume jurisdiction where the record shows the parties are all residents of the State, unless the record also shows that the construction of a federal act or treaty is necessary to the decision of the case. The fact that such an act or treaty is incidentally involved does not deprive the State courts of jurisdiction.

Whenever, on the whole record, a construction of the United States Constitution, statute or treaty is directly not incidentally involved, suit may be removed.

> See note to *Little York Gold Washington etc. Co. v. Keyes*, 24 L. Ed. 657, with list of cases there cited.

Federal jurisdiction obtains in

> "cases between individuals and corporations where the * * * laws * * * of the United States shall form the immediate and determining cause of the controversy."
>
> Fed. Cases 8541, *The Louisiana.*

A federal question is one arising under the constitution or a law of the United States or

treaties made, whenever the correct decision of the suit depends upon the construction of either, or when the title or right set up by the party may be defeated by one construction or sustained by the opposite construction.

Cohens v. Virginia, 5 L. Ed. 285;
Osborn v. Bank of United States, 6 L. Ed. 224;
Oregon v. Three Sisters Irr. Co., 158 Fed. 346;
Hall v. Chicago etc. R. R. Co., 149 Fed. 564.

A federal question does not arise merely because it becomes necessary in the progress of the litigation to construe the federal constitution, laws or treaties.

Miller v. Illinois Central R. Co., 168 Fed. 982;
Leggett v. Great Northern R. Co., 180 Fed. 314.

The Act of Congress here creates neither a private trust nor a public charity. The construction of the Federal Act is not necessary to the decision of the case.

The Act creates no right in appellee.

Grants of money and other property by the Federal Government to a particular state are not uncommon. Is there an instance in the books of any attempt by the Federal Government after such grant—no matter what its terms—to con-

trol its disposition in detail? Has the Federal Government, in any instance, followed up the fruits of its beneficence into the hands of the third and fourth generation? Its policy always has been to deal with the *states*, and to leave these sovereignties to deal with their own agencies.

Counsel for appellee suggested in the Circuit Court that *Southern Oregon Co. v. U. S.*, 241 Fed. 16, was a case in answer to our question. Not so, for two reasons, (1) the government there was a party litigant, and of course the court had jurisdiction, (2) the subject-matter of the litigation was *title to land* which under the *express* provisions of the Acts of Congress were subject to *forfeiture* by reason of *enforcible covenants* which had been breached. No such situation exists in the case at bar.

Suppose the State law had not been enacted. Appellee would then have no standing in court. Nor would the county itself, even under the Act of May 23, 1908, which carries this condition:

> "*Provided*, that when any forest reserve is in more than one state or territory or county, *the distributive share to each* from the proceeds of said reserve shall be proportional to its area therein."

The only way the county can get the money out of the State Treasury is by a legislative appropriation.

Yet, it is essential to federal jurisdiction that appellee's right be founded *in the Acts of Congress.*

Even assuming, for the purpose of argument, that the Federal Act contemplates an equal division of the funds for public school and public road purposes, still there is no federal question involved. This is true for the reason that Congress has declared that the funds shall

> "be expended as the State or Territorial Legislature may prescribe."

If the State selected the school districts as the statutory agencies, that would be the rule, and appellee's right to the fund would exist *in virtue of the State law.* Even so, it would not be a *right* in the sense that a *cestui que trust* has a *proprietary right* to trust funds and which are *stripped* of all trust character when coming finally into the hands of the *cestui que trust.* Rather it would be a *duty imposed by State statute* to receive such funds and to disburse them for public uses.

So far as appellee is concerned, its *duty* with relation to such of these moneys as it may receive is *identical* with its *duty* as to state funds paid to it by the State for school purposes.

Moreover, it is to be borne in mind that the question of jurisdiction was not raised in the *Everett School District* case. The Court there said (p. 632):

"The defendants have moved to dismiss, first, on the ground that the court has not jurisdiction of the subject-matter; second, that the bill of complaint does not state facts to constitute a valid cause of action in equity.

"No argument was presented upon the first ground of the motion to dismiss."

We respectfully submit that no federal question is involved and that the Court has no jurisdiction of the subject-matter or of the parties.

II.

THE BILL OF COMPLAINT DOES NOT STATE FACTS SUFFICIENT TO CONSTITUTE ANY GROUND FOR RELIEF.

A.

THE FEDERAL ACTS ARE ORDINARY APPROPRIATIONS OF PUBLIC FUNDS FOR SPECIFIED PUBLIC PURPOSES.

When the constituted public authority appropriates money for public purposes it discharges a *public power*, not a *private gift*. Can it be said that a state law appropriating money to aid in the construction, improvement and maintenance of public highways in the several counties is a public charity? Is it any more so when Congress with its power over post roads appropriates public funds therefor? In both cases they are appropriations of public funds for public purposes. Congress itself has done much

in aid of public education by grants of public lands and funds for such purposes. Not as a public charity—but in the exercise of its sovereign power.

The *trust*, so called, impressed upon these funds is the same trust which attaches to all legislative appropriations—namely, the authorized disbursements of public moneys for lawful purposes. Neither the law of private trusts, nor that of public charities is applicable.

If the State is *trustee* for the Government on moneys thus appropriated for the benefit of public roads in King County, then King County is a *trustee* for the State on moneys appropriated by it for the benefit of public roads in the County. Both are *appropriations* for lawful public purposes. Neither creates a trust fund. The same principle applies to the public schools.

There are situations where Congress has imposed conditions on the states which the courts have spoken of as *public trusts*. And in that class of cases the courts hold that it is a matter between the two sovereignties.

B.

IT IS A MATTER BETWEEN TWO SOVEREIGNTIES.

In cases of federal grants to the states where a trust character has been recognized, the courts *uniformly hold* that it is a matter between the two sovereignties and no action lies at the in-

stance of counties, school districts or individual citizens.

Judge Dillon, in *Barrett v. Brooks*, 21 Iowa 144, said (p. 148):

> "The United States in this grant deals with the States, and not with counties or individuals. *If the United States is satisfied with the disposition which the State has made, or authorized to be made, of these lands, individual citizens must remain content.*" (Italics ours.)

In *Stearns v. Minnesota ex rel. Marr*, 45 L. Ed. 162, it is said:

> "While some of the lands, the swamp lands were granted to the State for a purpose other than railroad construction, they were granted in trust and *it has long since been settled that Congress alone can inquire into the manner in which the State executed that trust and disposed of the lands.*" (Italics ours.)

In the recent case of *Alabama v. Schmidt*, 58 L. Ed. 555, the Court had under consideration an Act of Congress which provided that Section 16 in every township "shall be granted to the inhabitants of such township for the use of schools." The question presented by that case was whether or not a person could obtain title to these lands by adverse possession. The court,

in passing upon the question, stated as follows (p. 174):

> "But it does not apply to a gift to a state for a public purpose of which that state is the *sole guardian and minister*. As long ago as 1856 it was decided 'the trust created by these compacts relate to a subject certainly of universal interest, but of municipal concern, over which the power of the state is plenary and exclusive;' and it was held that the State of Michigan could sell its school lands without the consent of Congress. *Cooper v. Roberts*, 18 How. 173, 15 L. Ed. 338. This decision adverted to the fact that it had been usual for Congress to authorize the sale of lands if the state should desire it, but suggested that it was unnecessary (which, indeed, followed from what was decided) and thus met the further argument here pressed that a qualified permission to sell was given to Alabama by a much later act of March 2, 1827, Chap. 59, 4 Stat. at L. 237. It also disposes of other forms of the same contention, that the state law impairs the obligation of its contract, or involves a breach of trust, supposing that such positions are open to the state to take. *American Emigrant Co. v. Adams County*, 100 U. S. 61, 25 L. Ed. 563; *Spokane & B. C. R. Co. v. Washington & G. N. R. Co.*, 219

U. S. 166, 55 L. Ed. 159, 31 Sup. Ct. Rep. 182. The gift to the state is absolute, although, no doubt, as said in *Copper v. Roberts*, 'there is a sacred obligation imposed on its public faith.' But that obligation is honorary, like the one discussed in *Conley v. Ballinger*, 216 U. S. 84, 54 L. Ed. 393, 30 Sup. Ct. Rep. 224, and even in honor would not be broken by a sale and substitution of a fund, as in that case; a course, we believe, that has not been uncommon among the states. See further *Stuart v. Easton*, 170 U. S. 383, 394, 42 L. Ed. 1078, 1082, 18 Sup. Ct. Rep. 650." (Italics ours.)

The *Alabama* case is controlling on the point that a federal grant "*for the use of schools*" vests absolute title in the state.

American Emigrant Co. v. County of Adams (Iowa), 100 U. S. 61 (25 L Ed. 563), was a case involving swamp and overflowed lands granted to the State of Iowa by the Government upon certain conditions. By State law these lands were granted to the several counties. Adams County entered into a contract to sell these lands to the company, but later sued to rescind the contract, urging that the statutory scheme for the disposal of these lands violated the conditions of the federal grant. The Court said (p. 566):

> "It is very questionable whether the security for the application of the proceeds thus pointed out does not rest upon the good faith of the State, and whether the State may not exercise its discretion in that behalf without being liable to be called to account, and without affecting the titles to the lands disposed of. *At all events, it would seem that Congress alone has the power to enforce the conditions of the grant,* either by a revocation thereof or other suitable action, in a clear case of violation of the conditions. * * * No case is shown as the basis of any complaint, even on the part of the General Government, much less on the part of the County of Adams, which voluntarily entered into the arrangement complained of." (Italics ours.)

American Emigrant Co. v. Wright County, 97 U. S. 339 (24 L. Ed. 912), was relied on below by counsel for appellee as sustaining its position. A consideration of the case will disclose the error of such contention. This, like the *Adams County* case, was an Iowa case involving swamp lands granted to the State and by the State granted to the several counties. Wright County contracted for the sale of these lands and later sued to cancel the contract. This the Court permitted, holding that the officers of the company had not

acted in good faith with the County, saying (p. 916):

> "We are not convinced that any false representations were made by the agents or officers of the Emigrant Company. But the impression made upon us by the whole testimony is, that the officers and citizens of the County were in gross ignorance of the nature and value of what they were selling, that the Emigrant Company, on the other hand, were well informed in regard to both, and withheld this information unfairly from the officers of the County; that the sudden change of the relationship of Mr. Savary from an unsuccessful agent of the County to a successful agent of the Company requires an explanation which has not been satisfactorily given; that the fact that all parties knew they were dealing with a trust fund devoted by the donor to a specific purpose demanded the utmost good faith on the part of the purchaser; that so far from this, there is a provision for a diversion of the fund to other purposes, a gross inadequacy of consideration, and a successful speculation at the expense of the rights of the public."

The American Emigrant Company was a Connecticut corporation. Diversity of citizenship was thus established, the requisite amount was

involved and the court had jurisdiction of the parties. It was determined as an ordinary case of contract rescinded on account of bad faith of one party thereto.

But in the *Adams County* case, *supra*, the court concluded that bad faith was *not* shown, saying (p. 565):

> "* * * we see no sufficient proof that the contract was procured by false and fraudulent representations; and we are unable to sustain the decree of the circuit court on this ground. The case, in this respect, as to the character of the proofs, is very far short of that of the *Emigrant Co. v. Wright Co.* (*supra*)."

Therefore, the *Adams County* case could not be maintained as an equitable action to rescind a contract. Adams County was thus relegated to its other contention that the State statutory scheme for the disposal of the swamp lands was violative of the federal grant.

As is shown by the quotations, *supra*, from that case, the Court was of the opinion that Congress alone had power to enforce the conditions of the grant, that no case was shown as the basis for any complaint even on the part of the general government, much less on the part of Adams County, which voluntarily entered into the agreement complained of.

Counsel for appellee in the court below cited

So. Oregon Co. v. United States, 241 Fed. 16, in support of its position. That was a direct action by the Government itself to *forfeit title* to certain lands granted by the Government in 1869 upon certain conditions. Clearly, the Government itself could insist upon compliance with such conditions and could seek a forfeiture of title for violations thereof. The rule that it is a matter between two sovereignties, is not affected by any act of the Government in suing either the State or its grantee which took title subject to the conditions imposed by the Government. The rule, however, does preclude third parties from maintaining an action. Moreover, the case at bar does not involve real property.

The precise question in the case at bar was considered by the District Court of Alaska in 1915, in *Sulzer v. Smith*, 5 Alaska 338. Suit was brought by certain private citizens to enjoin the disbursement of forest reserve funds by the territorial legislature on the ground that the territorial statute was in violation of the Federal Act. The Court held that the plaintiff had no capacity to sue. After citing the Act of May 23, 1908, Judge Jennings said (p. 342):

> "The trust expressed in the act of Congress is a trust personal to the United States, and this suit is not brought by the United States.
>
> "When Congress directed this money to be

> turned over to the territorial treasurer to be expended in such way as the Legislature of Alaska might prescribe for the benefits of roads and schools in the county where the forest reserve was situate, it created only a personal trust. The money derived from the sale of the forest lands belonged to the United States, and the United States had the power to give it to whomsoever it pleased, and to make any person or body, corporate or unincorporate, its agents to disburse the fund. The United States constituted the Legislature of the territory as its disbursing agent, investing it with a large amount of discretion; the territorial treasurer is but the safe in which the money is deposited. Congress said to the Legislature:
>
> " 'We grant this money to the territory for the benefit of roads and schools in that part of the territory which produced the money, and we trust you to so apply it.'
>
> "If the Legislature does not so apply it, no one can complain but the donor, i. e., the United States."

Trusts may be classified as private trusts, public charities and public trusts. In private trusts there is a known trustee and a definite *cestui que trust* in whom the title to private property is vested and who may sue to enforce his private right.

In public charities there is a known trustee and indefinite, vague, uncertain and changing beneficiaries in whom the title does not vest and who have no private rights which they may enforce in court.

In strictly public trusts there is no charity, no trustee and no *cestui que trust.* There is a public obligation, a grant upon condition enforcible only at the instance of the grantor.

This point was clearly determined in the case of *State ex rel. J. Z. Moore, et al., as the Board of Regents of the State University, plaintiff, v. S. A. Callvert as Commissioner of Public Lands, defendant,* 34 Wash. 58 (74 Pac. 1018).

The Court there had under consideration § 17 of the enabling act which provided that there should be granted to the State of Washington,

> "* * * *for state, charitable, educational, penal and reformatory institutions, 200,000 acres.*" (Italics ours.)

The Legislature of the State of Washington provided that 100,000 acres of this land should be set aside to the University of Washington, and in construing this enabling act, the Court stated (p. 61):

> "It seems to us that the language used in § 17 is not susceptible of construction, and the fact that the legislature may have the power to appropriate to one institution more than its proportionate part of the grant can-

not affect the construction. *This is a question of public policy which must be determined exclusively by the Legislature.* And it cannot be discovered that what might on first thought be considered an unjust apportionment of the grant has any practical effect in any event. All these institutions are maintained by the state and the grant is simply an asset in the hands of the state to aid it in maintaining them. The passage of the act being within the authority of the legislature, the writ will issue as prayed for." (Italics ours.)

Here was a federal grant of six *classes* of institutions and *one-half* of the grant was by the State diverted to one institution in one class—yet the court said:

> "All these institutions are maintained by the state and the grant is simply an asset in the hands of the state to aid it in maintaining them."

What else is the Congressional grant in the case at bar?

The case of *United States v. Louisiana*, 32 L. Ed. 66, is controlling here. Three points were involved—

(1) Congress in 1811 enacted

> "That five per centum of the next proceeds of the sales of the lands of the United States, after the first day of January, shall

be applied to laying out and constructing public roads and levees in the said State, as the Legislature thereof may direct."

Under this provision certain moneys were due the State;

(2) Under the Swamp Land Acts of 1850 and 1855, certain moneys were due the State;

(3) The Government held as an investment for Indian Trust funds certain Louisiana State bonds.

The Government credited on maturing coupons of these bonds its debts under (1) and (2) to the State. The State sued in the court of claims and won, but lost on the Government's appeal.

The State contended that the Act of 1811 and the Swamp Land Acts created express trusts and cited the *Wright County* and *Adams County* cases. The opinion reviews these cases and others following them. In holding that the Government had the right to the set-off for such coupons, the Court said (p. 70):

"In accordance with the views of this court in the cases above cited, it must be held that the proceeds of the swamp lands are not subject to a property trust, either in the hands of the United States or in those of the State, in such sense that the claim of the United States upon the State for the overdue coupons on the Indian Trust bonds, involved in the present case, cannot be set

off against the claim of the State to the swamp land fund.

"Under the Act of 1850 the swamp lands are to be conveyed to the State as an absolue gift, with a direction that their proceeds shall be applied exclusively, as far as necessary, to the purpose of reclaiming the lands. The judgment of the State as to the necessity is paramount, and any application of the proceeds by the State to any other object is to be taken as the declaration of its judgment that the application of the proceeds to the reclamation of the lands is not necessary. By the 2d section of the Act of 1855 it is provided that the purchase money received by the United States for the swamp lands sold by them shall be paid over to the State. *There is nothing in these provisions of the character of a property trust*, and nothing to prevent the application, by the State, of the swamp land fund to general purposes. *If the power exists anywhere to enforce any provisions attached to the grant, it resides in Congress, and not in the court.*

"The same views apply to the provision as to the five per cent fund, in the Act of 1811, that it shall be applied to laying out and constructing public roads and levees in the State, '*as the Legislature thereof may*

direct;' and as to both the five per cent fund and the swamp land fund, we are of opinion that neither of them is of such a character that the debt due to the United States by the State of Louisiana, for the overdue coupons on the Indian Trust bonds, cannot be set off against the fund which is in the hands of the United States." (Italics ours.)

Since the views relating to the Swamp Land Acts apply to the five per cent fund of the Act of 1811, granted for laying out and constructing public roads and levees in the State *"as the Legislature thereof may direct,"* it follows that the forest reserve funds in the case at bar granted for public schools and public roads *"as the Legisture may prescribe"* are so subject. No property trust exists. As the Court said in its opinion,

> *"If the power exists anywhere to enforce any provisions attached to the grant, it resides in Congress, and not in the court."* (Italics ours.)

We respectfully submit that the bill of complaint does not state facts sufficient to constitute any ground for relief.

III.

No Trust Status Exists.

The trial court held that a private trust rela-

tion existed and that the Act of Congress should be construed as are wills and deeds.

The Circuit Court of Appeals held that it was not a case of a private trust or a public charity, but a public trust with a private character, to be construed as ordinary wills and deeds are construed.

A.

LOCAL LAW AS TO PUBLIC SCHOOLS AND ROADS.

Before discussing the trust relation, we desire to refer to the local law as to public schools and roads.

1. *As to Public Schools.*

The language of the federal act is "for the benefit of the *public* schools and public roads * * * of the *county* * * *."

Washington's public school system embraces the common schools (high and elementary) as well as special schools and state institutions like the State University (P. C. 1922 Code § 4720). All code references herein will be to Pierce's 1922 Code.

The administration of the public schools is thus delegated to three groups of officials: State Superintendent, County Superintendents, and Boards of Directors, P. C. §§ 4722, 4970, 4978. Their respective powers are set forth in §§ 4724, 4973 and 4979. Under the general laws, the state levies taxes for the State Superintendent's

office, the county for the County Superintendent's office and, in addition, both the state and county contribute toward the local district's expenses.

Under P. C. § 5097, the county may levy taxes for county school library purposes. School districts may unite for high school purposes, forming union high schools under P. C. §§ 4904, 4952.

For purposes of supervision and administration each county is constituted a separate county school district (P. C. § 4898).

School districts constitute bodies corporate with usual powers of public corporations (P. C. § 4906).

To which of these, county school district, county superintendent's office, county school library, union high schools, or common school districts does the Act of Congress apply? If the decision in this case depends on the construction of the federal act, and that act is held to be controlling, then it vests in appellee enforcible rights even as against a state statute which might provide for the disbursement of the funds for one of the other school system classifications.

If on the other hand, the federal act creates no enforcible rights in appellee, then we submit that the trial court was without jurisdiction either of subject matter or parties and also that appellee has no legal capacity to sue.

Clearly, the state legislature had power to direct the application of such funds as the county

commissioners in their discretion might determine, or for the County Superintendent's office, for County School libraries or for union high schools or for the specific school districts adjacent to the forest reserve itself. The latter in view of the fact that legislative classification is universal in ... application in this state and approved by the ...urts.

State ex rel. Hunt v. Tausick, 64 Wash. 69, 116 Pac. 651, 35 L. R. A. (N. S.) 802;

Puget Sound P. & L. Co. v. Seattle, 117 Wash. 351, 363, 201 Pac. 449.

What right has a school district to maintain this action, which cannot with equal force be urged by the County Superintendent, who is an independent public officer?

It is quite beside the point for the Circuit Court of Appeals to state, as it did in its opinion (Tr. p. 46), that school districts may sue and be sued. The same is true of the County Superintendent, but that fact invests neither with any right to maintain an action under the facts at bar.

2. *As to Public Roads.*

There is a perfect analogy in the local law relating to county highways (P. C. § 6051). Under this law, general county taxes are levied for "roads, bridges and wharves," also special levies for such purposes for each separate road

district. To that act there is a proviso that the county treasurer shall remit to the city or town treasurers in the county 15% of the money collected in such city or town for the general road and bridge fund, and

> "* * * said moneys so remitted shall be expended by the corporate authorities of such city or town on roads and bridges within said city or town connecting with roads leading out into the country known or designated as county roads" (P. C. § 6051).

Now, first, there can be no question but that the moneys in the general road and bridge fund, can be expended for roads, *or* bridges, *or* wharves, *or* all as and in such sums as the county commissioners in their discretion may determine, and by the same token, in the case at bar, the state statute (L. 1907, p. 406, P. C. § 6722) authorizing county commissioners to expend the forest reserve funds "for the benefit of the public schools and public roads, and not otherwise," authorizes the board of county commissioners in their discretion to expend these funds for public roads, *or* public schools, *or* both.

In the case of deeds, wills and private gifts, the trustee has no discretion. The grantor grants for the use of the *cestui que trust.* If the grant is to two or more in undetermined amounts the rule is that they are to share equally.

But in the instant case, the government paid

the money to the *state treasurer* "to be expended as the state legislature may prescribe." In the exercise of *its* discretion, the legislature left it to the discretion of the county commissioners. How then can it be held that a rule of law, applicable to private transactions where no discretion exists, can have any bearing on the case? As a matter of fact ,the state legislature could have made any disposition of these funds which it might have seen fit to do, and no one could complain except Congress.

This is so for the further reason that in the case of legislative appropriations for public purposes, there is no *cestui que trust* at all, the appropriation is for the benefit of the public. Nor does any element of contract exist here, as in the case of an issue of municipal bonds, wherein it may be stipulated that taxes shall be levied for principal and interest the taxes to be placed in a special fund pledged solely to that purpose.

So long as the action taken by the state is satisfactory to Congress, the federal court is without jurisdiction. If the action taken by the local authorities is contrary to the local law, it is a matter for local courts to determine, if equity jurisdiction can attach at all.

B.

APPROPRIATIONS.

The federal act under consideration is a *proviso* in the *appropriation* acts for the De-

partment of Agriculture for 1907 and 1908. Under that law all income from the Forest Reserves is covered into the federal treasury.

All federal disbursements must be by congressional appropriations (U. S. Const., Art. 1, Sec. 9).

> "The limitation in the Federal Constitution is that 'no money shall be drawn from the treasury but in consequence of appropriations made by law.' The object of this limitation, and that contained in the constitutions of the several states of similar import, is to secure to the legislative department the exclusive power of deciding how, when, and for what purposes the public funds shall be applied in carrying on the government. 2 Ops. Atty. Gen. U. S. 670. It had its origin in the British parliament, when the people of Great Britain, to provide against abuse by the king and his officers of the discretionary power with which they were vested, demanded that the public funds should not be drawn from the treasury except in accordance with express appropriations therefor made by parliament. Hallam, Const. Hist. 55. This was the fruit of the English revolution of 1688, which sent the king to Versailles, and changed the succession to the throne. This wise restraint has become a part of the fundamental law

of nearly every state in the Union. It has been well said that these provisions were 'obviously inserted to prevent the expenditure of the people's treasure without their consent, either as expressed by themselves in the organic law, or by their representatives in constitutional acts of legislation. To use the language of *Justice* Story (Vol. 3, Com. § 1342), its purpose 'is to secure regularity, punctuality, and fidelity in the disbursements of the public money.' "

State ex rel. Henderson v. Burdick, 24 L. R. A. 266, 267.

"The origin of legislative appropriations is so well known that it seems almost a work of supererogation to here allude to it. Legislative appropriations are the outgrowth of the long struggle in England against royal prerogative. By degrees the power of the crown to levy taxes was restrained and abolished, but it was found that, so long as the crown might at its own discretion disburse the revenue, the reservation to the people through parliament of the power to raise revenues was not a complete safeguard. Efforts to control the crown in disbursement as well as in the collection of revenues culminated with the revolution in 1688, and since then the crown may only disburse moneys in pursuance of appropriations made

by act of parliament. Three evils were at that time felt. In the first place, the use of the realm's revenue for purposes unlawful or distasteful to the people; secondly, the inability to control the crown in the amounts expended for particular objects; and thirdly, the disposition of the crown to avoid encroachments upon its self-asserted prerogatives by dispensing for long periods with sessions of parliament. By requiring appropriation for limited periods it was sought to remedy all three evils—the first two by making appropriations specific in amount and object, and the third by making them for limited periods, so that frequent parliamentary sessions should be absolutely necessary. The first two objects have been the subjects of repeated comment. The third, in view of our constitutional provision for biennial legislative sessions, and limiting the duration of appropriations to the end of the quarter succeeding the following session, justifies us in quoting the following from 2 Hallam's Constitutional History, Chapter 15, page 330: 'The lords of the treasury, by a clause annually repeated in the appropriation act of every session, are forbidden, under severe penalties, to order by their warrant any moneys in the exchequer, so appropriated, from being issued

> for any other service, and the officers of the exchequer to obey any such warrant. This has given the house of commons so effectual a control over the executive power, or, more truly speaking, has rendered it so much a participator in that power, that no administration can possibly subsist without its concurrence; nor can the session of parliament be intermitted for an entire year, without leaving both the naval and military force of the kingdom unprovided for': See, also, Creasy on the Constitution, 293."
>
> *State v. Moore*, 61 A. S. R. 538, 542;

See also

> *State ex rel. Davis v. Eggers*, 16 L. R. A. (N. S.) 630, 633;
>
> *State ex rel. Noonan v. King*, 67 S. W. 812, 814.

So much for the *reason* for the federal constitutional provision relating to appropriations. It never has been the province of the courts to interfere with the discretion of the crown, or the discretion accorded to executive officers by acts of Parliament or of Congress. Official discretion in the disbursement of public funds is the same today as before Parliament gained its ascendency, except that disbursements cannot be made for unauthorized purposes, nor in excess of appropriations.

From an examination of the 1907 appropria-

tion Act, it will be seen that it authorizes the expenditure of public funds for public purposes specified in the act, and, except in particular instances, leaves to the disbursing authority full discretion, except that disbursements cannot be made for unauthorized purposes.

Take the special case of free seeds, etc. There Congress is specific stating:

> "* * * An equal proportion of five-sixths of all seeds, bulbs, shrubs, vines, cuttings, and plants shall, upon their request, after due notification by the Secrertary of Agriculture that the allotment to their respective districts is ready for distribution, be supplied to Senators, Representatives and Delegates in Congress for distribution among their constituents * * *."
>
> 34 U. S. Stat. at L., p. 1268.

On the other hand the act allows the director of public roads $57,660.00 (p. 1280) for eleven itemized purposes. If the construction applied by the Circuit Court of Appeals is sound, then he *must* expend funds for each of these authorized purposes and in *equal proportions*—an untenable position.

Neither is there any merit in the claim that the *proviso* in question is different from the rest of the Act in that it is a *grant* to a state or political subdivision thereof. So is the appropriation by the act (p. 1278) of more than $1,000,000

for agricultural experiment stations of the several states. The construction contended for by appellee would compel the *pro rata* expenditure of such funds for the several specific purposes—a construction manifestly foreign to the purpose of the Act.

C.

THE LAW OF PRIVATE TRUSTS IS INAPPLICABLE.

The essential elements concurring in the creation of a private trust are

(1) A person competent to create it;
(2) Sufficient words to create it;
(3) A person capable of holding as trustee a specified or ascertainable object;
(4) A definite subject, and
(5) A declaration of the terms of the trust.

26 R. C. L. 1179.

Referring to the beneficiary, that same recognized authority states (26 R. C. L. 1189):

> "It is established by an unbroken line of decisions that there must be found within the terms of a declaration of trust a *cestui que trust*, and if there are no *certain* and *competent* beneficiaries named who may come into a court of equity and claim and establish their right to the fund and to the execution of the trust it will be void for uncertainty. It is not necessary to name the beneficiary, but he must be so designated

or described that he can be identified." (Italics ours.)

As to the trustee it is stated (26 R. C. L. 1271):

> "A trustee is a person holding the legal title to property, under an express or implied agreement to apply it, and the income arising from it, to the use and for the benefit of another person, who is called the *cestui que trust*. A trustee is one of the essential elements of every express trust,"

and as to the remedies of the *cestui que trust*, the rule is declared in 2 Perry on Trusts, 6th Ed. § 843, p. 1380:

> "If the *cestui que trust* is unable to trace the trust fund into the hands of other persons, or into the hands of third persons, other than *bona fide* holders for value or into other property in the hands of the trustee, or if he elects not to do so, he may proceed against the trustee personally. If the trust property or its proceeds cannot be identified, the *cestui que trust* may proceed against the trustee as against an ordinary creditor, and it is said, that if he elects to proceed against the trustee personally, he cannot also proceed against the trust fund."

An examination of the briefs of counsel in the *Everett School District* case and the cases cited therefrom by the court discloses the fact that that

case was determined in consonance with the foregoing principles of law relating to private trusts.

We shall, therefore, briefly refer to the authorities so cited.

Smith v. Ayer, 101 U. S. 320 (25 L. Ed. 955), was a will case where the executor had used assets of the estate for his personal gain. The Court very properly said (p. 958):

> "The law exacts the most perfect good faith from all parties dealing with a trustee respecting trust property. Whoever takes it for an object other than the general purposes of the trust, or such as may reasonably be supposed to be within its scope, must look to the authority of the trustee, or he will act at his peril."

Grant v. Phoenix Mut. Life Ins. Co., 121 U. S. 105 (30 L. Ed. 905), was a suit by the *cestui que trust* to foreclose the equity of redemption in property covered by twenty-six trust deeds. It was held that the suit was not multifarious and that the *cestui que trust* could maintain the action.

President and Trustees of Bowdoin College v. Merritt, (C. C.) 54 Fed. 55, was a will case wherein the parties in interest later entered into a trust agreement. The *cestui que trustent* under such trust deed brought suit to enforce the provisions of the trust. Their right to maintain such suit was upheld by the court.

In its opinion in the *Everett School District* case the court said (pp. 632-633):

> "The reception of the money by the defendant treasurer, under the provisions of the congressional and state acts, carried with it notice of the object and purpose of the money and its trust character, and any disposition of the funds contrary to the trust was at the defendant's peril (Smith v. Ayer, 101 U. S. 320, 25 L. Ed. 955), and the cestui que trust is not remediless when the fund is dissipated, but may sue in equity to protect such right (39 Cyc. 448; Grant v. Phoenix Life Insurance Co., 121 U. S. 105, 7 Sup. Ct. 841, 30 L. Ed. 905; President & Trustees of Bowdoin College v. Merritt (C. C.) 54 Fed. 55). * * *
>
> "I think it must be conceded that the acts of Congress (Act March 4, 1907, and Act May 23, 1908, supra), created an express trust of which the several school districts and road districts are the cestuis que trustents."

The cases cited in the footnote (p. 634) in the *Everett School District opinion* all involve deeds or wills. Hence, it is clear that the *Everett School District* case was disposed of on the law of private trusts. We most earnestly urge that such law is wholly inapplicable here because the

essential elements necessary to the creation of a private trust are lacking.

D.

THE LAW OF PUBLIC CHARITIES IS INAPPLICABLE.

In discussing the subject of public charities, the author in 2 Perry on Trusts, 6th Ed. § 687, p. 1130, says:

> "Trusts for charitable uses form a large and important class of trusts. The questions that arise under this head are numerous, and often complicated and difficult of solution. Charitable trusts include all gifts in trust for religious and educational purposes in their ever-varying diversity; all gifts for the relief and comfort of the poor, the sick, and the afflicted; and all gifts for the public convenience, benefit, utility, or ornament, in whatever manner the donors desire to have them applied. These trusts are governed in many respects by the same rules that govern trusts for the private benefit of individuals or families. *There must be the same proof of the due execution of a written instrument*, whether it creates a public charity or a private trust, and in many respects the same rules of construction will apply, in order to determine the intention of the donor; but if it is once determined that the donor intended to create

a public charity, very different rules from those that are applied in establishing and administering private trusts will be applied, in order to give effect to the intention of the donor and establish the charity. Thus, if in a gift for private benefit the cestuis que trustent are so uncertain that they cannot be identified, or cannot come into court and claim the benefit conferred upon them, the gift will fail, and result to the donor, his heirs or legal representatives. But if a gift is made for a public charitable purpose, it is immaterial that the trustee is uncertain, or incapable of taking, or that the objects of the charity are uncertain and indefinite. Indeed, it is said that vagueness is in some respects, essential to a good gift for a public charity, and that *a public charity begins where uncertainty in the recipient begins.* * * *" (Italics ours.)

And again (p. 1135):

"All this legislation for charity finally culminated in the Stat. 43 Eliz. c. 4 (1601), commonly called the statute of charitable uses. The charitable objects and purposes enumerated in this statute are as follows: 'Relief of aged, impotent, and poor people; maintenance of sick and maimed soldiers and mariners; *schools of learning, free schools,* and scholars in universities; repairs

of bridges, ports, havens, causeways, churches, sea-banks, and *high-ways;* education and preferment of orphans; relief, stock, or maintenance for houses of corrcetion; marriages of poor maids; supportation, aid, and help of young tradesmen, handicraftsmen, and persons decayed; relief or redemption of prisoners or captives; aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers, and other taxes.' * * *" (Italics ours.)

Public Charity is defined in 5 R. C. L. 293, as follows:

"A gift is a 'public' charity when there is a benefit to be conferred on the public at large, or some portion thereof, or upon an indefinite class of persons. Even if its benefits are confined to specified classes, as decrepit seamen, laborers, farmers, etc., of a particular town, it is well settled that it is a public charity. The essential elements of a public charity are that it is not confined to privileged individuals, but is open to the indefinite public. It is this indefinite, unrestricted quality that gives it its public character. * * *"

DISTINCTION BETWEEN CHARITABLE AND PRIVATE TRUSTS.

"The requisites of a valid private trust, and of one for a charitable use, are material-

ly different. In the former there must not only be a certain trustee who holds the legal title, but a certain specified *cestui que trust*, clearly identified, or made capable of identification, by the terms of the instrument creating the trust; while it is an essential feature of the latter that the beneficiaries are uncertain, a class of persons described in some general language, often fluctuating, changing in their individual members, and partaking of a quasi-public character. * * *"

5 R. C. L. 295.

A gift for the aid or benefit of defined persons is a private trust and not a charity.

Ballard v. Chandler, 149 Mass. 532-540.

"If the gift is for a public, charitable purpose, it is immaterial that the *cestuis que trustent* are indefinite or uncertain, or that the trustee is uncertain or incapable of taking."

Pennoyer v. Wadhams, 20 Or. 274, 25 Pac. 720;

John v. Smith, 91 Fed. 827.

This case went to the Circuit Court of Appeals, 102 Fed. 218, where it was *affirmed*.

In its affirming opinion the Oregon court "has recognized a clear distinction between charitable trusts and other trusts." The *beneficiaries* may be uncertain and unknown.

It is the *use* to which the property is applied and not the persons benefited which the law regards in such a case (See bottom p. 221.)

EDUCATIONAL PURPOSES.

"A trust for the purposes of education is a good charitable trust. The particular character of the education sought to be fostered by a charitable trust does not in any way affect its validity. * * *

"Trusts for the establishment and support of free or public schools are favored by the courts, and bequests for such purposes have repeatedly been upheld as valid charities or as creating valid trusts for charitable uses."

5 R. C. L. 330-331;

See also 2 Perry on Trusts, § 700.

STATE MAY ACT AS TRUSTEE.

"So, a state government has capacity to take a bequest to it for the purpose of establishing a school therein; and the legislature of the state may provide by law for the institution of the school and the administration of the charity."

14 L. R. A. (N. S.) 113;

See also *Levy v. Levy*, 40 Barbour 625.

POWER TO SELECT PURPOSE GIVEN TO TRUSTEE.

"Although the power of the courts to devise a scheme for the application of a vague

charity may well be questioned, it does not follow that the testator cannot create an agency to do it for him; and it may be regarded as settled in most jurisdictions that where a testator, creating a trust to a charitable use, defines the intention of the trust, and invests the trustee with discretionary power over the application of his bounty for the purposes intended, the bequest will not be held invalid so long as there is no obstacle to the exercise of the power confided to the trustee, for the exercise of the power may relieve the bequest of all objections arising out of its vague and indefinite character."

5 R. C. L. 351.

JURISDICTION OF COURTS.

"With regard to the origin and extent of the equitable jurisdiction over charitable trusts in this country, there is the utmost conflict of judicial utterances in the earlier cases. The opinion seems formerly to have prevailed that the peculiar equitable jurisdiction over charities, except where a trust valid by the ordinary rules of law and equity was created, was derived solely from the statute of uses. In more recent times, however, the subject of charities has undergone a great deal of investigation, both in England and the United States; and it has become definitely settled that trusts for charit-

able uses, or public charities, as known at the present time, are of ancient origin and have long been recognized as a part of the common law."

5 R. C. L. 357.

"The distinctive principles of equity, which courts apply to the enforcement and regulation of trusts for charitable uses, are confined to those States which have adopted the Statute 43 Eliz. c. 4, or the principles of the common law in regard to trusts, as they existed prior to the statute."

2 Perry on Trusts, 1239-40.

This rule is recognized by the Washington Court *In re Stewart's Estate*, 26 Wash. 32, where the court said (p. 38):

"That charitable uses have always been recognized by courts of equity seems to be established by undoubted authority. It is not necessary for authority to be sought under the Statute of 43 Elizabeth, for courts of equity here to recognize and enforce such trusts. Their inherent, original jurisdiction of all trusts gives cognizance of trusts for charitable uses."

It is further observed (p. 35):

"If the devise be for charitable uses, it is immaterial that the objects of the charity are uncertain and indefinite. Indeed, it is

said that vagueness is, in some respects, essential to a good gift for a public charity, and that a public charity begins where uncertainty in the recipient begins. 2 Perry, Trusts (4th ed.), § 687; 2 Pomeroy, Equity Jurisprudence (2d ed.), §§ 1018-1020. *It seems that a claimant for charity cannot have right to demand. A beneficiary who founds his claim on right cannot be the subject of charity.* Therefore the beneficiaries, as individuals, must be uncertain in a public or charitable trust." (Italics ours.)

In *Peth v. Spear*, 63 Wash. 291, Justice Fullerton said (p. 295):

> "Since the purpose of its donors was to provide a place where the doctrines of socialism could be taught by example as well as by precept, the trust can be said to belong to that species of charitable trusts known as educational. As such it is among the objects enumerated as charitable by the statute of 43 Eliz., c. 4, and within practically all the definitions of a charitable use as announced by the authorities."

We respectfully submit that the principles of law which govern charitable trusts are wholly foreign to those which obtain with respect to legislative appropriations. The essential elements in the one are absent from the other.

There is a diversity of underlying reason in

the two cases. In the one there is a *private* donor who for his own reasons by an instrument in writing duly executed, has set aside property or funds for specified public or quasi-public purposes. But the functions of government are exercised and continue quite apart from private benefactions. The legislative authority appropriates and the executive expends the public treasure. Neither Congress nor the judiciary can *compel* the executive to expend funds where discretion is involved. We recognize, of course, that the courts can compel ministerial officers to draw and pay warrants for adjudicated claims. The only limitation upon official discretion is that public disbursements cannot be made for other than public purposes, nor for purposes not authorized by the legislative branch, nor in excess of appropriations.

For a federal court of equity to take jurisdiction over an appropriation matter, to decree to whom, and how and in what specific amounts public funds shall be disbursed is an encroachment upon the powers of the executive.

It is not the function of the court to control the exercise of discretion.

7 R. C. L. 1047, 1048;
McQuillan, Munic. Corp. § 376,
22 R. C. L. p. 490;
Gaines v. Thompson, 19 L. Ed. 62.

E.

APPELLEE HAS NO LEGAL CAPACITY TO SUE.

It seems clear from the foregoing that appellee cannot maintain this action. As a private trust, appellee is not named as a *cestui que trust.* As a private trust, when trust property is turned over to the *cestui que trust,* such cestui assumes ownership and control thereover *stripped of any trust character,* but appellee is not so entitled to these funds.

As a public charity, the beneficiaries are indefinite, and in this case—if it be a public charity —the beneficiaries are those who enjoy the advantage of common schools and public roads—not appellee and, by the way, it is the same general public which in such case under appellee's position would enjoy both. In what amounts and how the funds are disbursed within the county can make no difference to the public since both roads and schools are supported by public taxation.

As a public trust, so called, the United States alone have power to enforce the conditions of the grant.

Sulzer v. Smith, 5 Alaska, 338, 342;
Alabama v. Schmidt, 58 L. Ed. 555;
Am. Emigrant Co. v. County of Adams, 25 L. Ed. 563;
Am. Emigrant Co. v. Wright County, 24 L. Ed. 912;
U. S. v. Louisiana, 32 L. Ed. 66.

CONCLUSION

This case involves an issue reaching down to the fundamentals of our system of government—the right of a court of equity to control discretion in the expenditure of public funds appropriated by law for public purposes.

If the use of the conjunctive in the proviso fixed the amount to be allotted to schools and to roads, then all legislation in the various states—framed on a different basis—is void as repugnant to the federal statute.

If appellee's right is founded in the state law—the action should have been brought in the state court. If the right rests in the federal statute, then state legislation cannot vary that right and the discretion accorded to it is meaningless.

We respectfully submit that the decision is unsupported by authority and unsound in principle. Congress did not concern itself with the *relative* needs for schools and roads, nor with the specific instrumentalities by which these funds were to be expended. For sufficient reasons it appropriated public funds for certain public purposes and left the rest to the state legislatures—not the court—to prescribe.

We urgently insist that the lower court erred in selecting the rules of law applicable to the facts at bar. Here is a case of public money appropriated by public authority to be used for public purposes. Wherein can the law of private

trusts apply? Wherein can the law of public charities apply, since a public charity is a *private benefaction* for public uses?

Public appropriations for public roads and public schools are not public charities. They are an exercise of sovereign power.

If one sovereignty turns public money over to another sovereignty for public purposes, that creates neither private trust nor public charity. If a trust relation results—it is a strictly public trust, personal to the originating sovereign.

So in the case at bar. Neither the law of private trusts, nor of public charities applies in this case. The *Everett School District* case is basically unsound and should be overruled. So long as Congress and the State remain content no one can question appellant's method of disbursing these funds. They are to be expended "by the county commissioners" as moneys are expended when raised for "road and bridge purposes."

"How much goes to roads and how much to bridges is for the commissioners to determine, in the light of the local needs of the County as a whole. *Where* and *when* the road money and the bridge money is to be spent is for them to say.

So in the case at bar, where the road money is to be spent is for them to determine. Certainly as a matter of *legislative policy* Congress did not contemplate that they would spend the road

money in Seattle. Neither has it placed any restrictions on *where* the school money shall be expended. Certain isolated school districts and road districts directly affected by the existence of the forest reserves might need all these moneys.

Congress left the whole matter of discretion to the State legislature. That body imposed the discretionary duty upon the counties—arms of the State government. If the court is to substitute judicial discretion as to the *proportion* to be allotted to roads and to schools then by the same logic it has power to determine *what* roads and *what* schools shall participate and how much each shall receive. It can say also that the school money shall be given to the County Superintendent, who is an integral part of the public school system and who is financed by county tax levies. But such is not the function or the power of the court.

We are not concerned in the suggestion that this decree helps the public schools. We believe in the public schools and as prosecuting attorney are *ex-officio* legal representative (P. C. § 1786) of all school districts in King County, except appellee district. We likewise believe in good roads and our loyal support extends to both.

But such sentiments are of no controlling force here. The primary issue is the right, under our system of government, of a court of equity to

control the discretion of public officials in the expenditure of public funds appropriated by law.

We respectfully submit that the decision of the Circuit Court of Appeals was erroneous, and should be reversed with instructions to reverse the decree of the trial court and dismiss the action.

Respectfully submitted,

MALCOLM DOUGLAS,

Solicitor for Appellant.

HOWARD A. HANSON,

Of Counsel.